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In the Supreme Court of the United States

OCTOBER TERM, 1981

GRACE WALKER,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Whether the act of the Trial Court in instructing the jury that they could consider the acts and statements of a person legally and factually unrelated to the Petitioner in regard to her guilt or innocence deprived her of due process and a fair trial.

II. Whether the act of the Trial Court in instructing the jury that they could consider the acts and statements of a person legally and factually unrelated to the Petition in regard to her guilt or innocence together with her joint trial with such person must necessarily have deprived the Petitioner of her substantial rights.

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PETITION FOR CERTIORARI

The Petitioner, GRACE WALKER, respectfully prays a Writ of Certiorari issue to review to judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 25, 1981.

CITATIONS TO OPINIONS BELOW

The United States District Court for the Western District of Texas entered a judgment of conviction of this Petitioner on April 17, 1980 as to a single count of 18 U.S.C. 1962(d), conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO). That conviction was made the subject of an appeal to the United States Court of Appeals for the Fifth Circuit which subsequently affirmed that conviction on September 25, 1981. The decision of the Fifth Circuit was published as *United States v. Sutherland*, 656 F. 2d 1181 (5th Cir. 1981), and reproduced herein as Appendix "A". The Petitioner then filed a *Petition for Rehearing* and a *Suggestion for Rehearing En Banc*. These petitions were denied in an unpublished order of the Fifth Circuit on November 4, 1981 and this order denying rehearing is reproduced herein as Appendix "B".

JURISDICTION

The judgment of conviction entered by the United States District Court was affirmed by the United States Court of Appeals. Petitioner's petitions for rehearing were denied on November 4, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 22.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V

reads in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This is a RICO prosecution under 18 U.S.C. 1962(d). The case below began with an indictment filed in January of 1980 which charged that Grace Walker, Petitioner herein, and Co-Conspirator, Edward Maynard, bribed Co-conspirator, Glen Sutherland, who was the night Court Municipal Judge in El Paso, Texas, regarding the disposition of some thirty odd traffic tickets from 1976 to 1979.[1] As the Petitioner unsuccessfully urged in the Trial Court and successfully urged in the Fifth Circuit, the indictment covered two separate and distinct conspiracies, Conspiracy "A": between the Petitioner and Judge Sutherland during 1976-177; and Conspiracy "B": between Edward Maynard and Judge Sutherland. Because of this division within the indictment, the facts will be sumarized separately as to each conspiracy.

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1. The indictment defined the racketeering acts as being specific acts of bribery regarding the listed tickets which were cognizable and punishable under Texas Law, Penal Code §36.02 (Vernon 1974).

A. Evidence Relating to Conspiracy "A"

The evidence adduced at trial regarding Conspiracy "A" was largely the testimony of various Municipal Clerks and the testimony of Sally Kalastro, a former employee at the Apodoca Bail Bond office where the Petitioner also worked. Chief Municipal Clerk, Herman Tafoya, and Allyn Averill, Traffic Violations Bureau Supervisor, were called by the Government and testified that certain tickets of the night Municipal Court in El Paso were handled "irregularly"[2] during the years 1976 to 1979, (RV 225-226, 238, 258-259, 264-265).[3] However, both clerks testified that they had no knowledge of any bribery, (RV 239; RVI 375), nor were they able to testify that the irregularly handled tickets and that the night Court was the worst offender in only one year, in the 1976-1979 period, (RVI 332-333). Chief Clerk Tafoya attributed this one year to the night Court's special irregular schedule rather than bribery, (RVI 332-333). Indeed, Chief Clerk Tafoya testified that such irregular handling had "developed into a *general practice" utilized by all Municipal Judges.*

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2. "Irregular" handling was defined as the disposition of traffic tickets through special settings which avoided the usual scheduling procedures, (RV 238, 258-259).

3. "Regularly" handled, (see Gov. Ex. 5, Sup. RI 13; Gov. Ex. 13, Sup. RI 14; Gov. Ex. 3; Gov. Ex. 3A; Gov. Ex.7; Gov. Ex. 29; Gov. Ex. 30; Gov. Ex. 31; Gov. Ex. 80; etc.).

In addition, Deputy Municipal Clerks, Virginia Portillo and Connie Medrano, were called to testify that Judge Sutherland did indeed handle numerous tickets, "irregularly", informally and outside of the regular scheduling procedures. Neither Deputy Clerk could testify specifically as to any ticket listed in the indictment, (RVIII 1052-1055). Regarding the "irregularly" set tickets listed in the indictment, no police officers, traffic violators, clerks, or other witnesses were called by the Government to testify as to the handling of those tickets.

The major Government witness, Kalastro, testified that on one occasion in 1975, and on that occasion only, Kalastro witnessed the Petitioner and Judge Sutherland in the Apodaca Bail Bond Office, (RVI 426-427, 568). According to Kalastro, she saw Judge Sutherland holding money and tickets, (RVI 426-427), although she could not describe the money, the transaction, or the identity of the tickets, (RVI 426-450). However, according to Kalastro, the Petitioner admitted to her that the Petitioner was bribing the Judge to handle traffic tickets, (RVI 449-450). After this event and after this alleged admission of the Petitioner, Kalastro testified that she would see

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4. Apparently, the list of tickets in the indictment were drawn by the Federal Bureau of Investigation by having Kalastro compare "names" she remembered to "names" on tickets handled by the night Court with a favorable disposition to the accused, (RVI 509, 531-533).

"tickets" from time to time in the bail bond office and Kalastro testified that she remembered various names being on the tickets, (RVI 464-468). Kalastro could not, however, identify any specific ticket as to being one she saw, (RVI 464-486, 506-507).[4] Kalastro did not see any further acts of bribery after 1975, nor did she hear any further admissions of the Petitioner, nor did she specifically see that Petitioner handled any of the "tickets seen in the office, (RVI 568-571).

Kalastro testified that she brought two tickets of "friends" into the bail bond office, (Gov. Ex. 5, Gov. Ex.13; RVI 468-469, 472-473). However, Kalastro was unaware of the disposition of these two tickets after bringing them in and could not testify regarding any bribery, (RVI 569-570). These two tickets, (Gov. Ex's 5, 13), unlike the other tickets relied on the indictment were identified by the violators as being theirs and their testimony was also that specific tickets we given to Kalastro as she testified, (RVII 617, 625). However, as fate would have it, both these tickets were "regularly" scheduled and handled with an attorney's name appearing on the ticket and on the docket book, (Gov. Ex. 5, 13; RVIII 621, 626). Also, the attorney, Ray Ramo, appeared and testified that he appeared for and handled the defense of the tickets himself as was the practice in the El Paso Municipal Courts, (Sup. RI 13, 14; RVI 351), and producecd the violator's copies of the tickets from his files, (Def. Exs. JJ, II).

The evidence presented by the defense at trial consisted of the testimony of the Petitioner denying the acts of bribery, character witnesses in Petitioner's behalf, character witnesses impeaching the credibility and reputation of Government witness Kalastro, etc.

In summary, the tickets allegedly attributable to Conspiracy "A" spanned from February 1976, (Gov. Ex. 30) to April, 1977, (Gov. Ex. 18). Following these "regularly" and irregularly" set tickets is an eighteen (18) month hiatus in the Government's evidence.

B. Evidence Relating to Conspiracy "B"

Begining in December of 1978, (Gov. Ex. 23), and continuing to June of 1979, (Gov. Ex. 22), the Government alleged that Edward Maynard bribed Judge Sutherland regarding the remainding tickets in the indictment (RIII 27-31). There was no allegation that Maynard associated with or even knew the Petitioner. In regard to these tickets, the Government presented a much more concrete case. The Government introduced the testimony of the various traffic violators who testified that they gave their tickets with money to Edward Maynard was overheard making various admissions to the violators and was also overheard talking to an individual referred to as "judge" and "your honor", for example:

"Maynard: And then just put the cash in there and just slip the envelope underneath. Estrada: Oh, okay. Maynard: Because that's not for me. And they won't, you know, they won't take checks from me. Estrada: Uh-huh. Maynard: When it is a deal like this, it's fixed." (RVII 682) ***"Maynard: You just reminded me. I better get those, type some of those. I want to go over there now. I've got two of my own, too. Better put those with these, so I don't forget. Did I fix them for awhile back?" (RVII 708) ***"Maynard : Oh, yeah. Is the Judge in? Let me talk to him. Honorable. ***Yeah. I got a couple of them here on this girl on a warrant. Uh-huh. They're, uh, uh, speeding and a red light. $56 bond. Hold on. What do you want to do? Go on and pay them or you wanna just forget them, so they won't go on record. "Maynard: Uh-huh. Yeah. Okay. Okay, I'll tell her. Bye. (Hanging up phone) He'll charge you, uh, $10 apiece over that will be $26 . But it won't go on your record. If it is dismissed, it won't go to Austin." (RVII 708-710) ***"Maynard: (Inaudible) "Cause he has to do it tomorrow. By the latest, tomorrow. He's got Court tomorrow at six o'clock. He's the only night court? Maynard: Yes. He's the only one." (RVII 716) ***Maynard: (Talking to someone on the phone) Well, year, it's a warrant. Okay. (Inaudible) Warrant dismissed (inaudible), okay? No, I'm leaving in about 10 minutes, I guess. Okay. Yeah, I got the receipt right here. He paid his own. Yeah, he gave them $400. He paid his own bond. Well, I need a dismissal, so he can go over and get his 400. Okay. Okay. Bye." (RVII 760) ***"Rede: Really? You fixed it? Maynard: Yeah (inaudible)." (RVII 862)

In addition, the Government introduced a pen register which demonstrated some 78 calls between Maynard and Judge Sutherland from June 12th to September 5th, 1979, (RVII 873). In addition, some of

the evidence was "false" tickets which were dummied up, funnelled through Maynard and which found their way into Sutherland's Court with a favorable disposition, (RVII 667, 693, 868). Thus in Maynard's case, as against that of the Petitioner, the Government had a rather complete chain of evidence butressed by tape recordings.

C. Events at Trial Regarding the Existence of the Two Conspiracies

As the Government's case unfolded, the defense counsel made numerous objections to various admissions of hearsay of alleged co-conspirators on the grounds that such hearsay could not jump from one distinct and separate conspiracy to another distinct and separate conspiracies, (RVII 655-659; RVIII 1112-1113, 1121, etc.). The Trial Court asked the Government to explain the connection between the two conspiracies, and the Government responded:

> MR. BOCK: First, Your Honor, it is well settled that conspirators do not have to know each other. They do not have to know the activities of each other in order for there to be one overall conspiracy. It's the Government's position that the conspiracy in this case, the hub of it, is the judge, and his activities with these other co-conspirators. And there is absolutely no requirement that they know each other or have knowledge of each other's activities. (RVII 656-657)

During the course of the trial, the trial counsel for Petitioner made a Motion for Severance and Mistrial on the grounds that the evidence showed two completely separate conspiracies and that his client was prejudiced by such a joint trial, (RIX 1460-1461); however, the Court denied the Motions, (RIX 1461).

Pressed to make a ruling before the jury in regard to the use of statements of Maynard and those of the Petitioner against each other pursuant to *United States v. James,* 590 F.2d)5th Cir. 1979), the Court late in the trial exceeded to the Government's request and made the following ruling:

> At one point in the trial, there was testimony from a witness, Sally Kalastro, concerning certain statements alleged to have been made by one of the defendants, Grace Walker. And then, at another witnesses, Virginia Estrada, Patricia Gandara, Robert Teplitz, Terry Youngblood, concerning statements alleged to have been made by the defendant, Edward Maynard. You may consider those statements if you believe the testimony and believe those statements were made and may consider those statements with respect to all of the defendants in this case.
> (RVII 1124)

The Government continued its argument before the Court that one conspiracy existed and also argued forcefully before the jury that only one conspiracy existed. The Government argued in final argument:

> We have a hub, being the judge of the court operating with two spokes, the two people, in this instance, the only two we found, who are bringing him tickets with money, and giving him the money to use his judicial position to dismiss those tickets. (Sup. RII 5)

And in closing argument:

> They were joined in a conspiracy and that conspiracy wias with Judge Sutherland to take bribes and for Miss Walker and Mr. Maynard to pay those bribes. (SUP. RII 79)

Later in the Court's charge, the Court expanded from the transference from conspiracy to conspiracy of "statements" to the transference of statements and *acts:*

> ...the statements and acts knowingly made and done during such conspiracy and in furtherance of its objects by any other proven member of the evidence against the defendant under consideration, even though he was not present to hear the statement made or see the act done.
> (RIX 1497-1498)

Following such instructions, the jury convicted all charged co-conspirators and the District Court sentenced them to two (2) years imprisionment apiece.

A. The Disposition of the Appeal by the Fifth Circuit.

The Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, alleging that the evidence ws insufficient as a matter of law,[5] that

5. The Fifth Circuit was initailly quite concerned with the legal sufficiency of the evidence (particularly as to Petitioner) in showing the two specific acts of racketeering required for a valid RICO conviction, 18 U.S.C. 1962, *United States v. Elliott*, 571 F. 2d 880 (5th Cir. 1978), *Cert Denied Sub. nom., United States v. Hawkins,*

there was a variance between the single conspiracy indictment and the proof at trial of two conspiracies and that she was prejudiced by her joint trial and by the use by jury of the acts and statements of Maynard in regard to her guilt or innocence.

In its decision, the Panel of the Fifth Circuit in *United States v. Sutherland, Maynard, and Walker,* 656 F. 2d 1181 (5th Cir. 1981) found that the evidence was legally sufficient, but that the Government had impermissibly joined two separate conspiracies at trial:

> In this case the government has not attempted to prove that Walker and Maynard agreed with each other to participate in a bribery scheme with Sutherland, nor has it contended that the nature of each defendant's agreement with Sutherland was such that he or she must necessarily have known that others were also conspiring to commit racketeering offenses in the conduct of the Municipal court. We must conclude, therefore, that the multiple conspiracy doctrine precluded the joint trial of the two multiple conspiracies involved in this case on a single RICO conspiracy count.
> *Sutherland,* at 1194

—U.S.—, 99 S.Ct. 349 (1978). the Panel hearing the case made an extraordinary request after oral argument of the Government and the various Appellants to submit further briefs and factual summaries, (See Government's *Supplemental Brief* and *Appellants' Joint Response to Government's Supplemental Brief,* and their Appendices.

And in regard to the acts and statements of co-conspirators which the Court allowed the jury to utilize, the Panel declared:

> Walker and Maynard argue that they hearsay statements could not properly be used against each other, and that consequently the district court erroneously instructed the jury that it could so consider this evidence. We agree that the court's brief instruction at the conclusion of the government's case was erroneous, for in that instruction the court allowed the jury to consider co-conspirator hearsay as to all defendants despite the failure of the government to introduce any evidence of a conspiracy between Walker and Maynard.
> *Sutherland* at 1200

And in regard to prejudice the panel conceded:

> This does not mean that the defedants' joinder in a single trial with evidence of each conspiracy was harmless, for proof at trial of a similar conspiracy to bribe the same judge obviously makes any hypothesis ofinnocence more difficult to accept.
> *Sutherland,* at 1200.

However, the Panel then backtracked and found that the substantial rights of Maynard and Walker had not been affected by their joint trial nor by the use of their acts and statements against each other because of three factors: (1) that the number of conspiracies was small; (2) that the evidence was clearly distinct and thus it must be assumed that in spite of the trial court's confusion and the Government's con-

fusion that the jury handled the evidence separately; and that the evidence against Maynard and Petitioner was overwhelming.[6]

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

The act of the Trial Court in instructing the jury that they could consider the acts and statements of a person legally and factually unrelated to the Petitioner in regard to her guilt or innocence deprived her of due process and fair trial.

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6. Regarding the Petitioner's defends, the Panel admitted that in regard to the Government's one direct evidence witness against Petitioner, Sally Kalastro, that the Petitioner "did in fact introduce substantial impeachment evidence", *Sutherland*, at 1196, but contends that the weight of the circumstantial evidence of the "irregularly disposed" and "favorably disposed" tickets transformed the Government's case into an overwhelming status. However, the Panel did not take into account the fact that only the impeached witness Kalastro could place two of the listed tickets in the Petitioner's hands and not even she could place the other tickets in the Petitioner's hands.

Likewise, the irregular handling simply showed irregularity or corruption in the Municipal Court, not that Petitioner was responsible for such practices. And in addition, the Petitioner took the stand to deny the allegations and produced character witnesses in her behalf. The Petitioner contends that such a defense based upon (1) impeaching the Government's direct witness; (2) showing gaps of proof in the Government's theories and evidence; (3) direct denial by the Defendant; and character witnesses for the Defendant raised at least an arguable defense.

II.

The act of the Trial Court in instructing the jury that they could consider the acts and statements of a person legally and factually unrelated to the Petitioner in regard to her guilt or innocence together with her joint trial with such person must necessarily have deprived the petitioner of her substantial rights.

A. Conflict With Prior Decisions Of This Court:

1. *United States v. Scales*, 357 U.S. 203, 81 S.CT. 1469, 6 L.Ed.2d 782, (1961). In that case, this court specifically held that "In our jurisprudence guilt is *personal*", *Scales* 367 U.S. at 224. In our case two individuals were accused of bribing the same Municipal court at different periods of time. To provide a more prosaic example, the Petitioner would offer the following. If a State Court should try two Defendants accused of robing the same convenience store at different times without knowledge or complicity in each other's actions, one would have to agree that error was committed. If the case against one Defendant was inmeasurably stronger and more complete, then one would have to agree that the error was high prejudicial. However, if the Trial Court explicity instructed the jury that the acts and statements of each separate Defendant could be used against the other defendant, there is no way that such a procedure could be sanctioned by our criminal justice system nor could it "withstand attack under

the due process clause of the Fifth Amendment", *Scales* 367 U.S. at 225. The procedure below gives hints of the evils of the mass trials we would expect in Eastern Europe where guilt, admissions, confessions, and acts are passed among a group of unrelated Defendants like common currency.

2. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1577 (1946). The Fifth Circuit held:

> In accordance with *Kotteakos* and its progeny, we must reverse the defendants' conviction if this error affected their substantial rights.

However, at the point of applying *Kotteakos*, the Fifth Circuit panel took direct issue with its principal tenets and held directly contrary to *Kotteakos*.

In providing a rationale for holding that the Petitioner's substantial rights were not prejudiced, the Fifth Circuit listed three factors, two of which were specially rejected by the Kotteakos Court in its holding. First, the Fifth Circuit held to one reason underlying its holding was that confusion of the jury regarding the two conspiracies was unlikely, *Sutherland* at 1196. This argument was utilized by Court of Appeals in *Kotteakos*, and specifically rejected by this Court:

On its face, as the Court of Appeals said, this protion of the charge was plainly wrong in application of the proof made; and the error pervaded the entire charge not merely the portion quoted. The jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose for loans. This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character. It may be that, notwithstanding the misdirection, the jury actually understood correctly the purport of the evidence, as the Government now concedes it to have been; and came to the conclusion that the petitioners were guilty only of the separate conpiracies in which the proof shows they respectively participated. But, in the fact of the misdirection and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregard the permission expressly given to ignore that vital difference. (footnotes and quotations ommitted)

The Fifth Circuit assumed that the jury saw clearly what the Court and the Government were just as clearly confused about,[7] and ig-

7. In pronouncements of the trial court and the government, the term "conpiracy" is used in the singular form to describe this case some 59 times, beginning in the indictment and ending in the Court's charge to jury, (RI 77-84; RV 41-42; 147-160; 161-171, 172 et seq; Sup RII 1 et seq;

nored the trial court's instructions to the contrary.

As in the *Kotteakos* case, the Trial Court below gave instructions which allowed the jury to supply the various elements of the RICO conspiracy through the act or acts of *one* of the alleged conspirators.[8] In rejecting the assumption that these instructions did not confuse the jury, the *Kotteakos Court declared:*

RIX 1486 et seq.) The term conspiracy is used in the plural form only by defense counsel. When defense counsel had the termerity to suggest that there were two conspiracies in final argument, (Sup RII 65) the Government specifically disputed this in its closing argument, (Sup RII 79).

8. Besides instructing the jury that they could use the acts and statements of co-conspirators against each other, the trial court instructed the jury that they need only find: . . . that at least one of the conspirators, during the existence of the conspiracy, knowingly committed at least two of the overt acts described in the indictment (RIX 1496) *** This is true because, as stated earlier, a conspiracy is a kind of partnership so that under the law each member is an agent or partner of the every other member, and each member is bound by or responsible for the acts and statements of every other member made in pursuance for the acts and statements of every other member made in pursuance of their unlawful scheme. (RIX 1498)***You are instructed that in order to find any of the defendants guilty, you must find from evidence beyond a reasonable doubt that the defendant Sutherland entered into the conspiracy with the intent to acept a pecuniary benefit from *one* of the other defendants on at least two separate occasions, . . . (RIX 1499).

The Court here was careful to caution to the jury to consider each defendant's case separately, in determining his participation in "the scheme" charged. But this is obviously does not, and could not, to to keeping distinct conspiracies disting, in view of the court's conception of the case. Moreover, the effect of the court's misconception extended also to the proof of overt acts. Carrying forward his premise that the jury could find one conspiracy on the evidence, the trial judge further charged that, if the jury found a conspiracy, "then the acts or the statements of any of those whom you so find to be conspirators between the two states that I have mentioned, may be considered by you in evidence as against all of the defendants whom you so find to be members of the conspiracy". The instructions in this phrase also declared: It is not necessary as a matter of law, that an overt act be charged against each defendant. It is sufficient if the conspiracy be established and the defendant be found to be a member of the conspiracy it is sufficient to allege overt acts on the part of any others who may have been members of the conspiracy it is sufficient to allege overt acts on the part of any others who may hae been members of the conspiracy, if those acts were done in furtherance of, and for the purpose of accomplishing the conspiracy. On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, were none was shown by the proof, but also for them to impute to each defendant the acts and statements of the other without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some. True, the court of appeals if painstakingly examined the evidence directly relating to each petitioner and concluded he had not been prejudiced in this manner. That judgment was

> founded largely in the fact tht each was clearly shown to have shared in the fraudulent phase of the conspiracy in which he participated. Even so, we do not understand how it can be concluded, in the face of the instruction, that the jury considered and was influenced by nothing else. *Kotteakos* 328 U.A. at 770-771.

Thus, in finding that the evidence was kept separate and distinct, the Fifth Circuit indulged in an assumption expressly rejected by *Kotteakos.* The Fifth Circuit was able to do by ignoring the trial court's instructions in its analysis, *Sutherland,* at 1196-1197.[9]

The second rationale offered by the Fifth Circuit was that the evidence was overwhelming:

> Third, and most importantly, the government introduced overwhelming evidence of guilt as to all three defendants and this evidence would have been admissible in two separate trials on individual conspiracy counts.

Of course, the Petitioner vehemently disagreed with this evaluation of the evidence agianst her. [10]

The *Kotteakos* Court specifically rejected this fact as a basis for holding such a joint trial harmless:

9. The existence and effect of such instructions were pointed out to the Court in every *Brief, Reply Brief,* and *Supplemental Brief* filed by petitioner upon oral argument, and upon *Petition for Rehearing.*

10. The Petitioner contends that such a defense based upon (1) impeaching the government's direct witness; (2) showing gaps of proof in the government's theories and evidence; (3) direct denial by the defendant; and character witnesses for the defendant raised at least an arguable defense.

> We have had regard also for the fact that the Court of Appeals painstakingly examined the evidence relating directly to each of the petitioners; found it convincing to the point of making guilt manifest; could not find substantial harm or unfairness in all pervading error or in any particular phase of the trial; and concluded that reversal would be a miscarriage of justice. With all deference we disagree with that conclusion and with the ruling that the permeating error did not affect "the substantial rights of the parties". That right, in each instance, was the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others as shown by this record. *Kotteakos* 328 U.S. at 775.

The last rationale advanced by the Fifth Circuit is that "the . . . first, the number of conspiracies (two) and defendants (three) is small . . ." *Sutherland*, at 1196. In regard to tis single basis for holding that the Petitioner's substantial rights were not violated, the Petitioner would argue first that this basis standing alone is insubstantial given the tansference of guilt that we must assume from the trial court's instructions. Secondly, this use of numbers alone fails to take into account that the case against Maynard was inmeasurably more complete and conclusive than that against Petitioner, especially as to this tape recorded acts and statements regarding the "dummied" tickets. See *Statement of the Case*, part "B", *supra*. Thirdly, any exclusive reliance on this basis alone emmasculates *Kotteakos* to the point of reducing tis Court's opinion in that case to

mere numbers. Eight conspiracies with assumed transference of built because of erroneous instructions by the trial court would require reversal. Two conspiracies with assumed transference of guilt because of erroneous instructions by the trial court would not require reversal. Thus, the application of *Kotteakos* becomes a mere numerical analysis.

Thus, in summary, the Fifth Circuit's holding in *Sutherland, supra* is contrary to this Court's holding in *Kotteakos* because the Fifth Circuit's decision: (1) made an assumption that the facts belie (and *Kotteakos* forbids) that the evidence was kept separate and distinct by the jury; (2) made an evaluation as to the weight of the evidence against each separate defendant if introduced at a separate trial as against the holding of *Kotteakos* that such an evaluation was irrelevant and immaterial to the substantial right allegedly breached, "that right . . . not to be tried en masse for the conglomeration of distinct and separate offenses committed by others. . .", *Kotteakos* at 775; and (3) reduced *Kotteakos*to a mere numerical analysis where there would not be prejudice to a defendant's substantial rights if he were tried on the acts and statements of two, three, or four unrelated co-defendants, but where his substantial rights to an individual trial would be prejudiced if he were tried on the acts of statements five, six, seven, or more unrelated defendants.

B. Reasons Why The Writ Should Be Granted

This is a RICO prosecution. Aside from the dangers of mass trials inherrent in any conspiracy trial, the dangers of such mass trial multiply when the emphasis is removed from the agreement and shifted to an "enterprise", 18 U.S.C. 1961, et seq, in this case a legal enterprise. Alleged illegal connection to the same legal enterprise provides the government with a "tar-baby" which can arguably be used to connect totally unrelated individuals as in this case, see *United States v. Cryan*, 490 F. Supp. 1234 (D.C.N.J. 1980), Tarlow, RICO: *The New Darling of the Prosecutor's Nursery, Fordham* L. Rev. (Nov. 1980) at pp. 251-252).

With this special aspect of a RICO prosecution in mind, the Petitioner urges this Court to apply *Kotteakos* stringently to these prosecutions and to her cause. Failure of this Court to act would demonstrate to the Government that this court has implicitly diluted the right to individual justice by at least a factor of one. In other words, one can be tried on the acts and statements of another if it is only one or two others. This of course, would work a tremendous evidentiary benefit in any criminal case where perhaps one defendant has presenting a stuborn defense. A large number of separate trials could be avoided. However, the duty of this Court flows not to efficiency

but to the Constitution. The *Kotteakos* Court understood this full well:

> There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our government is not one of mere convience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth. *Kotteakos*, 328 U.S. at 773.

As against abandoning the ideal of individual justice as it applies to trials of three or four individuals, the Petitioner would submit an alternative basis for analysis which the Petitioner believes is far more in line with the holding of *Kotteakos* than the opinion of the Fifth Circuit. The Petitioner believes that a joint trial where two or more separate conspiracies were joined intentionally, inadvertently, or in ignorance of the law, that the focus should be on each defendant as an individual. This evaluation should turn on whether there was a substantial liklihood of transference of guilt from an individual or individuals legally unrelated to her. The existence of a

large body of court instructions, which: (1) instructs the jury that they can transfer acts and statements of unrelated individuals; and (2) allows the jury to find guilt of all conspirators upon finding certain elements such as overt acts committed by any one conspirator, should require the reviewing court to assume that the principal of individualized guilt was violated and athat reversal is mandated because of this breach of a substantial right.

On the other hand, nothing can save the logic of an analysis that must assume that a trial jury did not consider legally unrelated acts and statements when the trial could not have been confused about the crucial issue when both the government and trial court were confused. Likewise, nothing can save the logic of an analysis that allows the transference of acts, statements, and guilt among unrelated individuals as long as they are not tried in especially large numbers. For these reasons a writ should be granted.

CONCLUSION AND PRAYER

Wherefore, the above premises considered, the Petitioner prays that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner, GRACE WALKER, hereby certifies as follows:

(a) That I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:

(b) That the names and addresses of the attorneys of record for the adverse party are as follows:

Honorable Rex E. Lee
Department of Justice
Office of the Solicitor General
Room 5143
Tenth & Constitution Avenues, N.W.
Washington, D.C. 20530

Edward Prado
United States Attorney
United States Attorney's Office
655 E. Durango Blvd.
Hemisfair Plaza
San Antonio, Texas 78206

(c) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said Rex E. Lee and the said Edward Prado, attorneys for said Respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

EXECUTED this the 4th day of January, 1982.

CHARLES LOUIS ROBERTS
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